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IN THE
COURT OF APPEALS OF INDIANA

ALVIN LAKES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 21A01-0612-CR-529
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FAYETTE CIRCUIT COURT
The Honorable Daniel Pflum, Judge
Cause No. 21C01-0412-FC-353

December 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Alvin Lakes appeals his conviction and sentence for class C felony child molesting. We reverse and remand for a new trial.

Issues

Lakes presents six issues for review, only two of which we must address:

I. Whether the trial court erred in denying his motion for directed verdict; and

II. Whether the trial court erred in refusing to give an instruction on class B misdemeanor battery as a lesser included offense of class C felony child molesting.

Facts and Procedural History

Lakes was married to Diana Brown from 1986 to 1997. Lakes and Brown had three children, including M.L., who was born June 3, 1992. Brown was granted physical custody of the children, and Lakes had visitation every other weekend. Sometime in February 2004, M.L. came home from school and was unusually quiet. When Brown asked M.L. what was wrong, he responded that Lakes "had been playing with his privates." Tr. at 179. Brown called her neighbor, Tiffany Gabbard, who immediately went to Brown's home. Brown told Gabbard to talk to M.L. M.L. told Gabbard that Lakes had "tickled [him] on [his] stomach and would put his hand where he shouldn't." *Id*. at 199. Subsequently, M.L. told his teacher that Lakes had "touched him sexually and inappropriately." *Id*. at 146. Brown obtained a protective order against Lakes.

On December 16, 2004, a grand jury indicted Lakes for class C felony child molesting. The indictment alleged that Lakes "knowingly or intentionally perform[ed]

fondling and/or touching of [M.L.], a child under the age of fourteen (14) years of age, with intent to arouse or satisfy the sexual desires of either [M.L.] and/or Alvin E. Lakes." Appellant's App. at 175. At trial, M.L. testified that when he was on his father's living room couch watching TV, Lakes tickled M.L.'s stomach and then "start[ed] his way down to [M.L.'s] hot dog and then he would tickle there for too long." Tr. at 115.[1] Both Lakes and M.L. were fully clothed, and Lakes tickled M.L. on the outside of his clothing. M.L. further testified that a similar incident occurred in the living room of Lakes's mother.[2] Lakes did not testify at trial. On April 4, 2006, the jury found Lakes guilty as charged. On November 3, 2006, the trial court sentenced Lakes to eight years on work release. This appeal ensued.

Discussion and Decision

I. Denial of Motion for Directed Verdict

At the close of the State's evidence, Lakes moved for a directed verdict, alleging that the State had failed to prove that he had intended to arouse or to satisfy the sexual desires of either himself or M.L. The trial court denied the motion. On appeal, Lakes contends that the trial court erred in doing so.

In addressing Lakes's contention, we consider the following:

> For a trial court to appropriately grant a motion for a directed verdict, there must be a total lack of evidence regarding an essential element of the crime, or the evidence must be without conflict and susceptible only to an inference in favor of the defendant's innocence. If the evidence is sufficient to sustain a

[1] At trial, M.L. acknowledged that he had previously stated that Lakes had touched his penis "a couple seconds," as opposed to "a couple seconds too long[.]" Tr. at 125.

[2] The State elicited inconsistent testimony from M.L. regarding the number of tickling incidents. *Compare id*. at 112 ("It happened at [Lakes's] house quite often.") *and* 113 ("I would usually be on the couch.") *with id*. at 116 ("Q: Okay, [M.L.] which incident was first? The one at your father's house or the one at your grandmother's? A: It was the one at my father's house.").

> conviction upon appeal, then a motion for directed verdict is properly denied. Thus, our standard of review is essentially the same as that upon a challenge to the sufficiency of the evidence. Upon review of claims of insufficient evidence, we neither reweigh evidence nor judge witness credibility. We will instead consider only the evidence which supports the conviction and the reasonable inferences to be drawn therefrom in order to determine whether there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt.

Proffit v. State, 817 N.E.2d 675, 680 (Ind. Ct. App. 2004) (citations omitted), *trans. denied* (2005).

Lakes argues that he was "alleged to have done nothing more than tickle his son and during the course of such tickling to have touched [M.L.'s] penis over his clothing for either a few seconds or a few seconds too long." Appellant's Br. at 17. He contends that this evidence is wholly insufficient to prove that he intended to arouse or to satisfy his or M.L.'s sexual desires. We disagree.

"The intent element of child molesting may be established by circumstantial evidence and inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points." *Pedrick v. State*, 593 N.E.2d 1213, 1220 (Ind. Ct. App. 1992). It is true, as Lakes observes, that "[m]ere touching is not sufficient to constitute the crime of child molesting." *Rodriguez v. State*, 868 N.E.2d 551, 553 (Ind. Ct. App. 2007). That said, our supreme court has stated that "[i]ntentional touching of the genital area can be circumstantial evidence of intent to arouse or satisfy sexual desires." *Sanchez v. State*, 675 N.E.2d 306, 311 (Ind. 1996). Here, the State presented evidence that Lakes knowingly or intentionally touched M.L.'s genital area "for too long." Tr. at 115. From this evidence, the jury could have drawn the conclusion that Lakes intended to arouse or to satisfy his or M.L.'s sexual

desires beyond a reasonable doubt. Therefore, we affirm the trial court's denial of Lakes's motion for directed verdict.

II. Refusal of Battery Instruction

After both sides rested, Lakes requested an instruction on class B misdemeanor battery as a lesser included offense of class C felony child molesting. The trial court refused to give the instruction. Lakes contends that the trial court erred in doing so. We agree.

In *Shouse v. State*, we explained,

> When a defendant requests a lesser-included offense instruction, a trial court applies a three-part analysis: (1) determine whether the lesser-included offense is inherently included in the crime charged; if not, (2) determine whether the lesser-included offense is factually included in the crime charged; and, if either, (3) determine whether a serious evidentiary dispute exists whereby the jury could conclude that the lesser offense was committed but not the greater offense. If the last step is reached and answered affirmatively, then the requested instruction for a lesser-included offense should be given.
>
> Our standard of review is abuse of discretion when the trial court has made a finding on the existence or lack of a serious evidentiary dispute. Where there is no such finding, the reviewing court makes the required determination *de novo* based on its own review of the evidence.

849 N.E.2d 650, 657 (Ind. Ct. App. 2006) (citations omitted), *trans. denied*.

The State alleged that Lakes committed class C felony child molesting by knowingly or intentionally fondling and/or touching M.L., a child under fourteen years of age, with intent to arouse or to satisfy his or M.L.'s sexual desires. *See* Appellant's App. at 175 (indictment); *see also* Ind. Code § 35-42-4-3(b) (child molesting statute). Indiana Code Section 35-42-2-1(a) defines class B misdemeanor battery as the knowing or intentional touching of another person in a rude, insolent, or angry manner. In *Pedrick*, we explained that "[b]attery is not an inherently included offense of child molesting because it is possible

to commit the latter crime solely by submitting to a touch rather than performing one." 593 N.E.2d at 1217. We agree with both Lakes and the State that class B misdemeanor battery is a factually included lesser offense of class C felony child molesting in this case because the indictment alleges that Lakes touched M.L. The question, then, is whether a serious evidentiary dispute existed regarding whether Lakes touched M.L. in a rude, insolent, or angry manner or with intent to arouse or to satisfy his or M.L.'s sexual desires. The trial court did not make a finding on this issue; consequently, we review the matter de novo. *Shouse*, 849 N.E.2d at 657.

Lakes urges us to follow *Pedrick*, in which the defendant was a substitute teacher "whose responsibilities included teaching fourth and fifth-grade physical education classes." 593 N.E.2d at 1215.

> After a relay race, Pedrick patted N.C. on her posterior, said "good job," and also patted and rubbed her chest. Pedrick also placed both hands on the hips of S.W., telling her she had done well in the last relay race. Pedrick put his arm over the shoulder of K.L. and touched her breast, but she jerked away. Later, Pedrick approached K.L. again and began tickling her stomach. As Pedrick's hands began to move down her stomach toward her vagina, K.L. quickly sat down.
>
> While standing near the classroom closets Pedrick said "good job" to A.C., put his arm around her, and patted and rubbed her breast. During class, Pedrick put his arm around the shoulder of M.M. and let his hand hang, touching her breast. M.M. then backed away from Pedrick. Also during class, Pedrick put his hand up the shirt sleeve of A.H. and pinched her shoulder. Pedrick also placed his hand on the shoulder of E.J. and then on her breast.

Id. at 1215-16.

Pedrick was convicted of five counts of class C felony child molesting. On appeal, he argued that the trial court erred in refusing to give an instruction on class B misdemeanor battery. Pedrick "point[ed] out it was undisputed at trial that he had touched the children; his

sole defense was that the touches were not intended to be sexual." *Id*. at 1217. He "assert[ed] the jury could have reasonably inferred his touches were rude and insolent but not sexual[.]" *Id*. We agreed, concluding that although

> there was sufficient evidence for the jury to find Pedrick guilty of child molesting, the evidence does not rule out the existence of a serious evidentiary dispute on the issue of Pedrick's intent. Under the present evidence reasonable minds could have concluded Pedrick touched the children in a rude or insolent manner, but that he did so without an intent to satisfy his sexual desires.

Id. (footnote omitted). Consequently, we reversed Pedrick's convictions and remanded for a new trial.

The State contends that this case more closely resembles *Spann v. State*, 850 N.E.2d 411 (Ind. Ct. App. 2006), in which we recited the following facts:

> Thirteen-year-old K.S. was a friend of a boy who lived with Spann, his uncle. K.S. spent much time at Spann's house doing chores and playing video and computer games and often spent the night at Spann's house during the summer. When K.S. would spend the night at Spann's house, he would take a shower before going to bed.
>
> On one occasion in August of 2004, K.S. was waiting to take a shower at Spann's house when his friend came out of the bathroom and told K.S. that it was his turn. When K.S. went into the bathroom, Spann was already in the shower, naked, and Spann told K.S. to disrobe and get in the shower. K.S. did so. Spann then took a washcloth and soap and proceeded to wash K.S.'s back, buttocks, chest, and finally his penis. After washing K.S.'s penis, Spann asked, "Did it hurt?"
>
> A few days later, K.S. again was spending the night at Spann's house. Normally, when K.S. spent the night he would sleep in a one-person bed in Spann's bedroom while Spann slept in a separate king- or queen-size bed. On this occasion, however, Spann asked K.S. to get into the big bed with him. Before K.S. got into bed, Spann told him, "Don't wear no boxers, just wear your pajama pants and a shirt." K.S. got into the bed facing away from Spann. Shortly after K.S. got into the bed, Spann put one of his legs over K.S.'s legs, then put his hand down K.S.'s pants and touched K.S.'s penis. Spann did not immediately remove his hand from K.S.'s penis, but when he did, K.S. left the big bed and returned to the small bed.

Id. at 413 (citations to transcript omitted).

The State charged Spann with two counts of class C felony child molesting. At trial, Spann requested a battery instruction. The trial court refused, finding that the touching "'either occurred with the intent to satisfy or gratify sexual desires, or it did not occur at all.'" *Id*. at 415 (citation to transcript omitted). We agreed with the trial court, noting that

> Spann did not testify on his own behalf at trial. Concerning the shower incident, counsel argued to the jury that Spann merely helped K.S. clean up in the shower and that there was no sexual intent. This explanation defies logic. K.S. was an able-bodied thirteen-year-old, perfectly capable of washing himself. He was not a young child and did not have a disability that prevented him from adequately washing himself. Spann was not a doctor or nurse who touched K.S.'s penis for medical reasons. Simply put, under such circumstances one does not take hold of another person's penis unless there is sexual intent. There is but one reasonable inference here, and that is that Spann's washing of K.S.'s penis was done with the intent to arouse or gratify Spann's sexual desires. We find it inconceivable that the jury might have found Spann's touching and washing of K.S.'s penis to be "rude, insolent, or angry" but not done with sexual intent.

Id.

We find *Pedrick* more persuasive here. M.L. testified that Lakes tickled him *over* his clothing and lingered at his genital area for either "a couple seconds" or "a couple seconds too long." In closing argument, Lakes's counsel both questioned whether the tickling occurred at all and suggested that M.L. might have misinterpreted Lakes's intent.[3] In arguing for a battery instruction, Lakes's counsel noted that the dictionary defines "rude" as "lacking refinement, cultural elegance, uncouth, boorish, [coarse] or vulgar" and asserted that the jury could find that Lakes's touching of M.L. was "uncouth or vulgar." Tr. at 203. We must

[3] Unfortunately, Lakes's counsel's opening statement was largely inaudible and therefore unable to be transcribed by the court reporter. Tr. at 100.

agree. The mere fact that Lakes touched M.L.'s genital area does not rule out the existence of a serious evidentiary dispute as to Lakes's intent. Under the facts of this case, we hold that a serious evidentiary dispute existed and that the trial court erred in refusing to give an instruction on the lesser included offense of class B misdemeanor battery. We therefore reverse Lakes's conviction for class C felony child molesting and remand for a new trial.[4]

Reversed and remanded.

DARDEN, J., and MAY, J., concur.

[4] Consequently, we need not address Lakes's arguments regarding alleged evidentiary and sentencing errors.